

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES BOYER,	§
	§ No. 629, 2006
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for Sussex County
STATE OF DELAWARE,	§ Cr. ID No. 0206001272
	§
Plaintiff Below-	§
Appellee.	§

Submitted: January 11, 2007
Decided: February 13, 2007

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices

ORDER

This 13th day of February 2007, upon consideration of the appellant's opening brief and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The defendant-appellant, James Boyer, filed an appeal from the Superior Court's October 18, 2006 order denying his motion for sentence modification pursuant to Superior Court Criminal Rule 35 and the Superior Court's November 2, 2006 order denying his motion for reargument. The plaintiff-appellee, the State of Delaware, has moved to affirm the Superior Court's judgment on the ground that it is manifest on the face of Boyer's opening brief that his appeal is without merit. Because we have no

jurisdiction to consider Boyer's appeal from the October 18, 2006 order, that portion of the appeal must be DISMISSED. As for Boyer's appeal from the November 2, 2006 order, we agree with the State's motion and AFFIRM the Superior Court's judgment.

(2) In December 2002, Boyer pleaded no contest to Trafficking in Cocaine, Possession of a Firearm During the Commission of a Felony, Possession With Intent to Deliver Cocaine, Maintaining a Dwelling for the Keeping of Controlled Substances, and Conspiracy in the Second Degree. He was sentenced to a total of 13 years of Level V incarceration, to be followed by probation. In October 2004, the Superior Court corrected Boyer's sentencing order to reflect that Boyer had received a mandatory 5-year sentence at Level V on his conviction of Possession With Intent to Deliver Cocaine.

(3) In October 2006, Boyer moved to modify his sentence on the ground that the Superior Court improperly enhanced his sentence. By order dated October 18, 2006, the Superior Court denied the motion. On October 30, 2006, Boyer filed a motion for reargument. The Superior Court denied the motion on November 2, 2006.

(4) In this appeal, Boyer claims that a) his sentence was improperly enhanced without any factual support in the record; and b) the improper enhancement of his sentence violated his constitutional rights.

(5) A motion for reargument must be filed within 5 days of the Superior Court's decision.¹ Because the Superior Court's order denying Boyer's motion for postconviction relief was docketed on October 18, 2006, a timely motion for reargument had to be filed no later than October 25, 2006.² The record reflects that the motion was not filed until October 30, 2006 and, therefore, was untimely. Moreover, because the untimely motion for reargument did not toll the time for Boyer's appeal of the Superior Court's October 18, 2006 order,³ his appeal of that order to this Court, which was docketed on November 30, 2006, also was untimely.⁴

(6) While we do not have jurisdiction to consider Boyer's untimely appeal of the Superior Court's October 18, 2006 order,⁵ we do have jurisdiction to consider Boyer's timely appeal from the denial of his motion for reargument. We conclude that the Superior Court correctly denied the motion for reargument, albeit for the wrong reason. While denying the motion on substantive grounds, the Superior Court, in fact, had no

¹ Super. Ct. Civ. R. 59(e); Super. Ct. Crim. R. 57(d).

² Super. Ct. Crim. R. 45(a).

³ *McDaniel v. DaimlerChrysler Corp.*, 860 A.2d 321, 323 (Del. 2004).

⁴ Supr. Ct. R. 6(a) (iii).

⁵ *Preform Building Components, Inc. v. Edwards*, 280 A.2d 697, 698 (Del. 1971).

jurisdiction to consider the untimely motion.⁶ We, therefore, conclude that the motion for reargument was properly denied, although for reasons different from those relied upon by the Superior Court.⁷

(7) It is manifest on the face of Boyer's opening brief that the appeal is without merit because the issues presented on appeal are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that the appeal of the Superior Court's October 18, 2006 order is DISMISSED. Pursuant to Supreme Court Rule 25(a), the State of Delaware's motion to affirm the Superior Court's November 2, 2006 order is GRANTED. The judgment of the Superior Court is AFFIRMED.⁸

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

⁶ Id.

⁷ *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1390 (Del. 1995).

⁸ On February 5, 2007, Boyer filed a "Motion for Leave to Reply to the Appellee's Motion to Affirm." In the motion, Boyer argues that his October 30, 2006 motion for reargument was timely because he did not receive the Superior Court's October 18, 2006 order until October 23, 2006. Because the 5-day time period is calculated from the date of docketing, and not the date of receipt, Boyer's argument is without merit. Super. Ct. Civ. R. 59(e).